(1)

88-557

Supreme Court, U.S.
FILED
SEP 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner

v.

REGINALD D. LEIGH
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

John D. O'Hair
Prosecuting Attorney
County of Wayne

Timothy A. Baughman
Chief of the Criminal Division
Research, Training and Appeals
1441 St. Antoine
Detroit, MI 48226
(313)224-5792

STATEMENT OF THE QUESTION PRESENTED

I

SHOULD CERTIORARI BE GRANTED TO RESOLVE THE SPLIT AMONGST FEDERAL CIRCUITS AND THAT AMONGST STATE COURTS AS TO WHETHER A NECESSARY ELEMENT OF A DUE PROCESS "DELAY IN ARREST" CLAIM IS THAT THE DELAY ON THE PART OF THE GOVERNMENT WAS FOR THE PURPOSE OF GAINING A TACTICAL ADVANTAGE OVER THE ACCUSED?

TABLE OF CONTENTS

Statement of the Questions.....1

Index of Authorities.....3

Opinions Below.....5

Jurisdiction.....5

Constitutional Provisions.....5

Statement of the Case.....6

Reasons for Granting Writ.....15

Conclusion.....19

Appendix A.....1a

Appendix B.....9a

INDEX OF AUTHORITIES

Dickerson v Louisiana, 816 F 2d 220 (CA5, 1987).....16

Hoo v United States, 825 F 2d 667 (CA2, 1987) cert den 98 L Ed 2d 777.....15,16

People v Lawson, 367 NE 2d 1244 (1977).....17

State v Grissom, 746 P 2d 661 (NM App, 1987).....17

United States v Automated Medical Laboratories, 770 F 2d 339 (CA4, 1985).....16

United States v Caporale, 806 F 2d 1487 (CA 11, 1986).....15

United States v Hollins, 811 F 2d 384 (CA7, 1984).....16

United States v Ismaili, 828 F 2d 153 (CA3, 1987).....15

United States v Jenkins, 701 F 2d 850 (CA10, 1983).....15

United States v Lebron-Gonzalez, 816 F 2d 823 (CA 1, 1987).....15

United States v Lovasco, 431 US 783 (1977).....15

United States v Valentine, 783 F 2d 1413 (CA9, 1986).....16

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner

v.

REGINALD D. LEIGH
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals entered in the above cause on June 9, 1988, leave denied by the Michigan Supreme Court on September 13, 1988 with two justices dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix A. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on June 9, 1988. The order of the Michigan Supreme Court was entered on September 13, 1988. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATEMENT OF THE CASE

In the instant case respondent was charged with Possession With Intent To Deliver Cocaine. On February 13, 1987 respondent brought a motion to dismiss based on a denial of due process argument (the Michigan Court of Appeals also stated that "The dismissal stems from defendant's claim that he was denied due process....")

In response to respondent's motion testimony was taken from Police Officer Franscott Fowler of the Detroit Police Narcotics Section. Officer Fowler testified that he was working on May 8, 1986 and that he was one of the officer's responsible for executing a Search Warrant at Reggie's Hair Salon at 9314 Woodward in the City of Detroit. (T. 7) He further testified that as a result of

that search respondent was arrested. After respondent was arrested a Not-In-Custody warrant (warrant which is issued when respondent is released and not in the custody of the police department) was prepared. (T. 8) Officer Fowler further indicated that there was a need for a laboratory analysis and that getting that analysis caused some delay because the lab was operating short of people. The shortage of lab people was one of the reasons why respondent's warrant request was a Not-In-Custody warrant request. (T. 9-10) This initial warrant request was denied by the prosecutor in part because the lock seal folder numbers were missing from the PCRs (the officers' Preliminary Complaint Reports) and in part because the lab analysis had not been completed. The lab analysis sheets were submitted to the lab the day after the arrest, May 9, 1986,

but the analysis could not be completed until August 30,1986. The officer further testified that he had no plan or scheme or desire to hold property from the respondent. (T. 10-11) After the laboratory analysis was completed a second warrant request was sought in December 1986. (T. 12-13)

Respondent made no specific allegations of prejudice nor did he allege intentional delay on the part of the police or prosecution to gain tactical advantage over the respondent, but rather, respondent argued:

> "now in that period of time, one, your memory is vague, people move, people change addresses. This is like two-thirds of the year. Then you come with a warrant and you don't have the jacket and I don't know where the jacket is, whether it was taken by them or not.

> But, the Officer who testified at the exam said they don't have the jacket. And, now you are going to say 'These narcotics that was found in the jacket, in an area where other people were found also belongs to the defendant." With no jacket to try it on, no witnesses to testify who it may have belonged to. This puts the defendant in a position which is totally untenorable (sic) and unjust. He could not conceivably now get a hold of the people that could testify because of this delay. And, the delay, your Honor, is unwarranted, unjustified. There is no reason for it, other than to the net result whether it was intentional or not as to prejudice the defendant. The delay doesn't have to be intentional. It is the net result that it is an unexplainable delay and that innures (sic) to his prejudice and certainly it is obvious that it so innures (sic)."(T. 26-28) (Emphasis Added)

The trial Prosecutor argued to the Court that respondent has no right to be arrested and that respondent had misapplied the law as it relates to a due process, speedy arrest claim. (T. 28-32)

The Court then ruled as follows:

Now, it is my understanding that there are two motions that have been presented by Mr. Sherman. The first motion he argued it and that motion complains that because of a delay of 225 days from the time of the alleged criminal activity and the arrest that his client has been unduly prejudiced and his Constitutional Rights therefore have been violated and for that reason this case should be dismissed.

This case, to me, is somewhat similar to the case of People v Hernandez in which there was a delay of some 42 days. There was a situation where there had been a dope -- alleged dope transaction, drug transaction, purchase made and later a search warrant executed upon a home. And there was 42 days from that alleged incident that the defendant in the case was subsequently arrested and charged with the drug offense. And, the Court reviewing that situation and as pointed out by Defense Counsel, one of the considerations in that case was the fact that this person, the defendant was illiterate and it appeared certainly in that case, that he had very little understanding what was occurring. But, the Court went on in the Hernandez case to set out the guidelines which are used in judging whether or not person's rights have been violated. One of the things that they looked at is whether or not the delay is explainable. And in our case, the case that we have

before us today, I believe Sergeant Fowler has explained the delay. Whether or not that prejudiced the defendant is another matter, but he has given an explanation.

He has indicated at that time the lab had a personnel shortage and, I think it is pretty common knowledge that there was a shortage of chemists in that department which backed up the analysis that they were performing. The other thing that we look at is whether or not the delay is deliberate.

Now, Mr. Sherman suggests in his argument that because of a motion filed to return property and the like that there might have been something under the table that made this deliberate. I don't see it that way. The important issue though, is whether or not the delay of some 225 days caused this defendant undue prejudice, and I believe that Mr. Sherman has made a pretty good case, in my opinion, in support of that.

First of all, we are dealing here with a business establishment. Officer Fowler has indicated that it was a beauty-type barber shop type business and one would expect large number of people coming and going from that type of establishment. He indicated that the drugs were found in one of the back rooms. Some were found in a jacket. He, for purposes of hearing, was not able to clearly identify where the other drugs were found.

The jacket, according to Sergeant Fowler, was not confiscated. He indicated that they did have proof of residency and, apparently, they are relying on that. But, the Court case, the case of Hernandez and the other cases which are in this area, look to whether or not the delay -- and there is no particular number of days involved -- but whether or not sufficient time has expired that would cause the Defense. And the Defense have said they have trouble finding out who was there, and that is understandable.

It is a business place. They have trouble finding out who was there at that time who could give testimony in their behalf. They also indicated that they have a problem remembering the details of the situation with the expiration of the time that was involved here.

Now, I believe that looking at this matter of balance that this defendant would have a tough time defending himself against these charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time. And, there is, in my opinion, undue prejudice because of the delay. And, at this time, although the intentions of the police seem to be within reason, they are just working with a very difficult situation or were working with a very difficult situation at that time. But it appears that this defendant would be unduly prejudiced

> to permit this to continue and for that reason the complaint is dismissed and the defendant is discharged from this complaint. (T 32-36) (Emphasis Added)

The Court's holding itself demonstrates that the court found no deliberate delay on the part of the police to gain tactical advantage and ultimately found that respondent had presented a "theory" of prejudice which it believed was plausible.

The Michigan Court of Appeals upheld the dismissal, rejecting the People's argument that purposeful delay in order to gain a tactical advantage was a necessary element of a due process delay in charging claim, and rejecting the People's claim that substantial prejudice had not been demonstrated. Instead the court found that upon a showing of "some" prejudice the burden shifted to the State

to explain the delay, and then a balancing process between the reason for the delay, and the strength of the prejudice, was undertaken. The People then applied for leave to the Michigan Supreme Court, requesting that court to resolve whether a due process delay in charging claim requires <u>both</u> 1)actual and substantial prejudice, and 2)purposeful delay in order to gain a tactical advantage. That court denied leave to appeal, two justices dissenting.

REASONS FOR GRANTING THE WRIT

Since this Court's decision in United States v Lovasco, 431 US 783 (1977) lower federal courts, state courts, and litigants, have struggled to ascertain the requirements for a due process delay in charging claim, with conflicting results. At least five federal circuits hold that improper motive--deliberate delay in order to gain a tactical advantage--is a requirement for the success of a due process claim. See e.g. United States v Lebron-Gonzalez, 816 F 2d 823 (CA 1, 1987), Hoo v United States, 825 F 2d 667 (CA2, 1987); United States v Ismaili, 828 F 2d 153 (CA3, 1987); United States v Jenkins, 701 F 2d 850 (CA10, 1983); United States v Caporale, 806 F 2d 1487 (CA 11, 1986). At least two circuits, on the other hand, have taken

the position, consistent with that of the Michigan Court of Appeals in this case, that the test is a balancing of prejudice and the explanation for the delay. See e.g. United States v Valentine, 783 F 2d 1413 (CA9, 1986); United States v Automated Medical Laboratories, 770 f 2d 339 (CA4, 1985). Moreover, several circuits have internal conflicts on the issue. See Dickerson v Louisiana, 816 F 2d 220 (CA5, 1987); United States v Hollins, 811 F 2d 384 (CA7, 1984). These conflicts were noted by Justice White dissenting from the denial of certiorari in Hoo v United States, 98 L Ed 2d 777 (1988).

Moreover, state courts are not consistent on this issue, and consequently are on one side or the other of the split among federal circuits. For

example, the Supreme Court of Illinois in People v Lawson, 367 NE 2d 1244 (1977) rejected a claim that Lovasco requires intentional delay to disadvantage the accused, but see State v Grissom, 746 P 2d 661 (NM App, 1987), citing Jenkins with approval.

Michigan, like most jurisdictions, has a statute of limitations for criminal actions. That governing the crime involved here is 6 years. If, as courts have repeatedly held, the statute of limitations is the primary guarantee against stale charges, with the due process clause to play only a limited role, then a delay of 225 days between the crime here and the formal charging of the defendant, where the statute of limitations is 6 years, should not be found to violate due process absent a

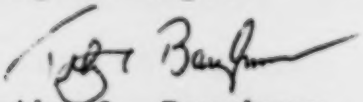
finding of improper motive. Petitioner requests this Court grant leave to resolve this issue of national importance, upon which the courts are split.

CONCLUSION

WHEREFORE, for the reasons above stated, Petitioner submits that plenary review should be granted.

Respectfully submitted,

John D. O'Hair
Prosecuting Attorney
County of Wayne



Timothy A. Baughman
Chief of the Criminal
Division, Research,
Training and Appeals
1441 St. Antoine
Detroit, MI 48226
(313)224-5792

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN
PLaintiff-Appellant,

v

June 9, 1988

REGINALD D. LEIGH,
Defendant-Appellee. No. 99662

BEFORE: D.E. Holbrook, Jr., P.J., and MacKenzie and N.A. Baguley*, JJ.

PER CURIAM

Defendant was charged with possession with intent to deliver less than 50 grams of cocaine, MCL 333.7104(1)(2)(a)(iv); MSA 14.15(7104)(1)(2)(a)(iv). The prosecutor appeals as of right from a Recorder's Court order dismissing the charge. We affirm.

The dismissal stems from defendant's claim that he was denied due process

*Circuit judge, sitting on the Court of Appeals by assignment

because 225 days elapsed between his arrest and the initiation of prosecution against him. The record establishes that the police executed a search warrant at defendant's business, Reggie's Styles Unlimited hair salon, on May 8, 1986. Several people were in the salon at the time. During the search, Officer James Willis retrieved from a yellow sport jacket he found hanging in a back room a bundle of 20 coin envelopes containing cocaine and paperwork with defendant's name. Defendant was arrested and later released from police custody when no complaint and "in-custody" warrant were issued. A complaint and "not-in-custody" warrant were eventually issued on December 2, 1986. Defendant was arraigned on December 18, 1986, 225 days after his original arrest.

In People v Bisard, 114 Mich App 784, 791; 319 NW2d 670 (1982), this Court

stated the test to be used in determining whether a delay in instituting prosecution denies a defendant due process:

> "(O)nce a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. This approach places the burden of coming forward with evidence of prejudice on the defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibility for determining when an investigation should end."

See also People v Bargo, 139 Mich App 573; 362 NW2d 840 (1984); People v Shelson, 150 Mich App 718; 389 NW2d 159 (1986); lv den 426 Mich 862 (1986); People v Dungey, 147 Mich App 83; 383 NW2d 128 (1985).

Defendant's contention was that the yellow jacket containing the cocaine was not his and was too small to fit him. By

December, the jacket was missing. At the hearing on defendant's motion to dismiss, defense counsel claimed that the delay prejudiced defendant's efforts to determine the owner of the yellow jacket. Counsel pointed out that there were several employees and customers in the salon at the time the warrant was executed, and that the back room was routinely used as a lounge by customers and apparently employees so that the jacket could belong to anyone. By December, defendant had forgotten the names of everyone present on May 8 and had been unable to locate some of those persons whose presence he did recall and who might know to whom the jacket belonged.

Police officer Franscott Fowler, who was involved in the execution of the search warrant on May 8, testified that

the primary reason for the delay was that a laboratory analysis of the cocaine was needed before a warrant could be issued, and that due to a shortage of technicians that analysis was not completed until August 30, 1986, Fowler offered no explanation for the 94 day delay between completion of the analysis and issuance of the complaint and warrant. Fowler further testified that the police originally sought a complaint and warrant from the prosecutor's office in May, but that the prosecutor "wanted the officers who found the narcotics to have (identification numbers of the) lock seal folder(s) in which the narcotics (were) placed on...their PCR's and not just on the Evidence Officer's PCR's". On cross-examination, Fowler estimated transferring the numbers would take approximately five minutes.

The trial court ruled as follows:

> "Now, I believe that looking at this matter on balance that this defendant would have a tough time defending himself against these charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time. And, there is, in my opinion, undue prejudice because of the delay. And, at this time, although the intentions of the police seem to be within reason, they are just working with a very difficult situation or were working with a very difficult situation at that time. But it appears that this defendant would be unduly prejudiced to permit this to continue and for that reason the complaint is dismissed and the defendant is discharged from this complaint".

The prosecution contends that the trial court clearly erred in finding that defendant had shown prejudice because of the delay, the first part of the Bisard test. More specifically, the prosecution suggests that "the Bisard court's statement that the defendant carries the burden of showing 'some' prejudice was an inadvertent error." According to the

prosecution, defendant had to show actual and substantial prejudice and purposeful delay to gain tactical advantage in order to meet his burden of going forward. We disagree with the prosecution's analysis. We think that the Bisard panel's adoption of the "some prejudice" standard was deliberate rather than "inadvertent error". The crux of the Bisard test is the balancing of prejudice to defendant against the reasonableness of the delayed prosecution. Under the prosecution's proposed test, there would be no need to balance; either the scale would inevitably tip toward the defendant or the court would not reach the balancing stage because the defendant could not meet the stringent burden the prosecution would have imposed.

In this case, the court found that the defendant had adequately shown prejudice

and we are not convinced that this determination was erroneous. Nor can we say that the court erred in finding the reason for the delay--understaffing in the laboratory--was sufficient to justify the delay. Compare Dungey, supra. In any event, this explanation completely failed to account for 94 days of the delay. Accordingly, we affirm the ruling of the trial court that on balance, the prejudice to defendant outweighed the reasons provided by the state for the delay.

Affirmed.

/s/Donald e. Holbrook, Jr.

/s/Barbara b. MacKenzie

/s/Norman A. Baguley

APPENDIX B
MICHIGAN SUPREME COURT

ORDER
Entered: September 13, 1988

83641

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC:83641
COA:99662
LC:87-00032

REGINALD D. LEIGH
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

Brickley and Boyle, JJ, would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of

the order entered at the direction of the court.

September 13, 1988 /s/Corbin R Davis

Supreme Court, U.S.
FILED
MAR 10 1989
JOSEPH F. SPANIOL, JR.

No. 88-557

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MICHIGAN, PETITIONER

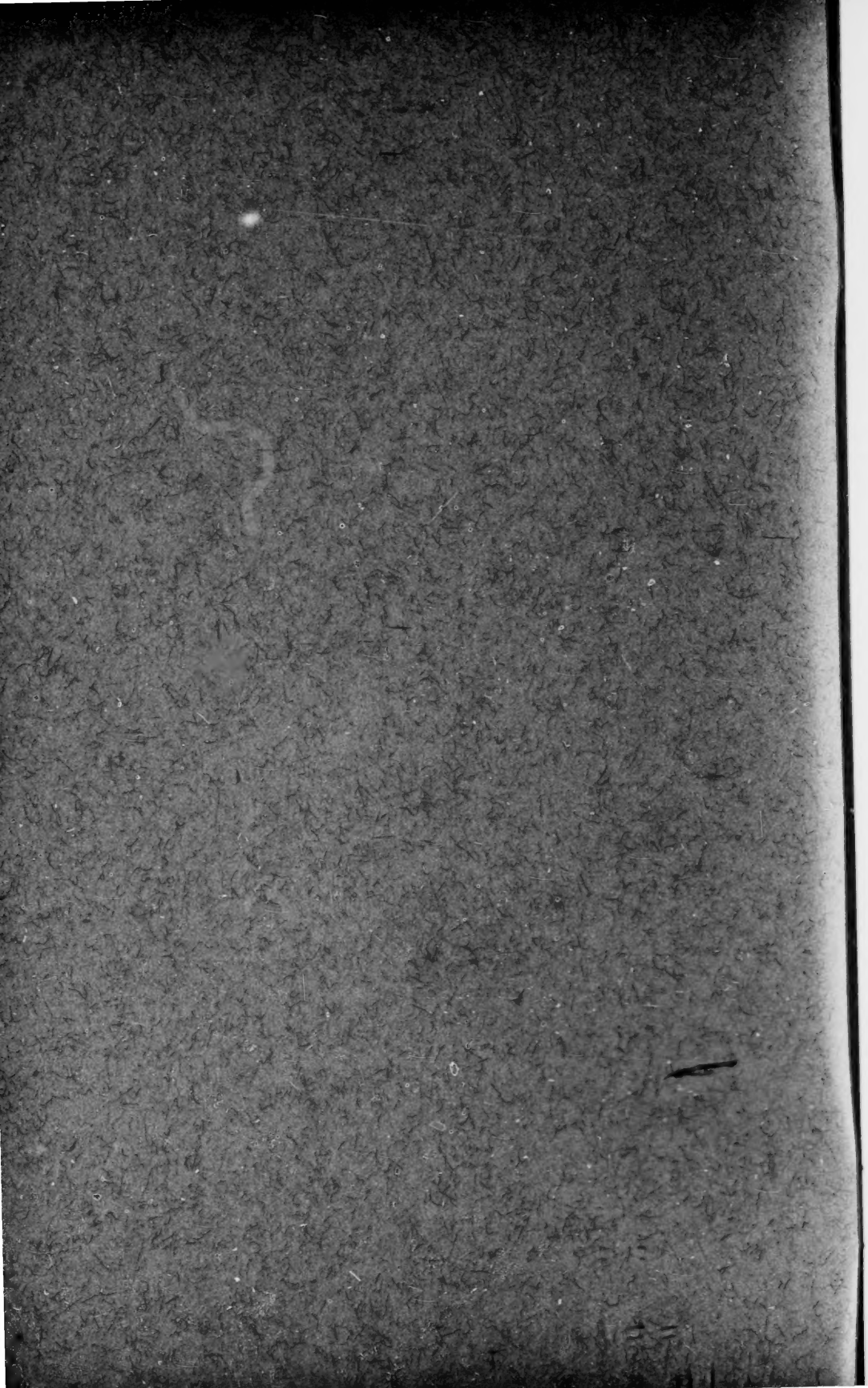
v.

REGINALD D. LEIGH

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217



QUESTION PRESENTED

Whether the State's delay in filing a criminal complaint against respondent warranted dismissal of that complaint under the Due Process Clause.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Arizona v. *Youngblood*, 109 S.Ct. 333 (1988) 7, 8, 14, 15
Dickerson v. *Louisiana*, 816 F.2d 220 (5th Cir.), cert. denied, 108 S.Ct. 352 (1987) 9
Harris v. *Reed*, No. 87-5677 (Feb. 22, 1989) 12
Michigan v. *Long*, 463 U.S. 1032 (1983) 11
People v. *Bisard*, 114 Mich. App. 784, 319 N.W.2d 670 (1982) 5, 10, 11
People v. *Dungey*, 147 Mich. App. 83, 383 N.W.2d 128 (1985) 11
People v. *Hernandez*, 15 Mich. App. 141, 170 N.W.2d 851 (1968) 4, 10, 11
People v. *Lawson*, 67 Ill. 2d 449, 367 N.E.2d 1244 (1977) 9, 10, 11
People v. *Leigh*, No. 87-00032 (Mich. Rec. Ct.) 3, 10
People v. *Leigh*, No. 99662 (Mich. Ct. App.) 10
People v. *Mallory*, 421 Mich. 229, 365 N.W.2d 673 (1985) 2
People v. *Nuss*, 405 Mich. 437, 276 N.W.2d 448 (1979) ... 9, 11
People v. *Shelson*, 150 Mich. App. 718, 389 N.W.2d 159 (1986) 11
People v. *Vargo*, 139 Mich. App. 573, 362 N.W.2d 840 (1984) 11
Ross v. *United States*, 349 F.2d 210 (D.C. Cir. 1965) 10
State v. *Anderson*, 46 Wash. App. 565, 731 P.2d 519 (1986) 9
State v. *Baker*, 614 S.W.2d 352 (Tenn. 1981) 8
State v. *Hall*, 395 N.W.2d 640 (Iowa 1986) 8
State v. *Luck*, 15 Ohio St. 3d 150, 472 N.E.2d 1097 (1984) 9
State v. *Nelson*, 719 S.W.2d 13 (Mo. App. (1986) 8

Cases—Continued: Page

United States v. *Atisha*, 804 F.2d 920 (6th Cir. 1986), cert. denied, 479 U.S. 1067 (1987) 8
United States v. *Bartlett*, 794 F.2d 1285 (8th Cir. 1985), cert. denied, 479 U.S. 934 (1986) 9
United States v. *Brock*, 782 F.2d 1442 (7th Cir. 1986) 13
United States v. *Caporale*, 806 F.2d 1487 (11th Cir. 1986), certs. denied, 107 S. Ct. 3195, 3265 (1987) 8
United States v. *Gouveia*, 467 U.S. 180 (1984) 8
United States v. *Hollins*, 811 F.2d 384 (7th Cir. 1987), cert. denied, 108 S.Ct. 742 (1988) 9
United States v. *Hoo*, 825 F.2d 667 (2d Cir. 1987), cert. denied, 108 S. Ct. 742 (1988) 8
United States v. *Ismaili*, 828 F.2d 153 (3d Cir. 1987), cert. denied, 108 S.Ct. 1110 (1988)..... 8, 13
United States v. *Jenkins*, 701 F.2d 850 (10th Cir. 1983) ... 8, 13
United States v. *Lebron-Gonzalez*, 816 F.2d 823 (1st Cir.), certs. denied, 108 S. Ct. 135, 165 (1987) 8
United States v. *Lovasco*, 431 U.S. 783 (1977) 6, 7, 8
United States v. *Marion*, 400 U.S. 307 (1971) 7, 8
United States v. *Mills*, 641 F.2d 785 (9th Cir.) ~~1985), (9th Cir.)~~ cert. denied, 454 U.S. 902 (1981) 13
United States v. *Moran*, 759 F.2d 777 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986) 9
United States v. *Scott*, 795 F.2d 1245 (5th Cir. 1986) 9
United States v. *Taylor*, 603 F.2d 732 (8th Cir.), cert. denied, 444 U.S. 982 (1979) 9
United States v. *Townley*, 665 F.2d 579 (5th Cir.), cert. denied, 456 U.S. 1010 (1982) 9
United States v. *Wallace*, 848 F.2d 1464 (9th Cir. 1988) .. 13
United States v. *Watkins*, 709 F.2d 475 (7th Cir. 1983) ... 9

Constitution and statutes:

U.S. Const.:
Amend. V (Due Process Clause) 6, 7, 8, 9, 10, 13
Amend. XIV (Due Process Clause) 10, 11
Mich. Comp. Laws Ann. (West 1980 & Supp. 1988):
§ 333.7104(2) 1
§ 333.7214(a)(iv) (Supp. 1988) 1
§ 333.7401 1

Statutes – Continued: Page

§ 764.1(1) 2
§ 764.13 2
§ 764.26 2
§ 766.1 2
Mich. Comp. Laws Ann. (West 1982):
§ 766.4 2
§ 766.13 2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-557

THE STATE OF MICHIGAN, PETITIONER

v.

REGINALD D. LEIGH

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. On May 8, 1986, Detroit police officers executed a search warrant at respondent's business, Reggie's Styles Unlimited, a hair salon in Detroit. In the back room of the salon, the officers found a jacket that contained 20 envelopes of cocaine and a piece of paper with respondent's name on it (Pet. App. 2a). The officers arrested respondent on the charge of possession of cocaine with intent to deliver it.[1] Respondent was released from custody several

---

[1] Possession of cocaine with intent to deliver it is a felony under Michigan law. See Mich. Comp. Laws Ann. §§ 333.7104(2), 333.7214(a)(iv), 333.7401 (West 1980 & Supp. 1988).

days later, without having formal charges lodged against him.[2] On December 2, 1986, a magistrate issued a complaint and warrant formally charging respondent with the offense of possession with intent to deliver less than 50 grams of cocaine. *Ibid.*

Respondent was again arrested and arraigned before a magistrate on December 18, 1986, some 225 days after his initial arrest. Pet. App. 2a. On December 23, 1986, respondent appeared before the 36th District Court for the City of Detroit. After a brief hearing, the state court found that there was probable cause to charge respondent with the narcotics offense. Accordingly, the court bound him over for trial before the Recorder's Court for the City of Detroit. Dec. 23, 1986, Tr. 1-15; see Mich. Comp. Laws Ann. §§ 766.1, 766.4, and 766.13 (1982).[3]

---

[2] Under Michigan law, an individual arrested on a felony charge without a warrant must be brought promptly before a magistrate for arraignment on a written complaint and warrant. See Mich. Comp. Laws Ann. §§ 764.13 and 764.26 (West 1982). Those documents, which initiate the formal charging process, must be authorized by the prosecuting attorney. See Mich. Comp. Laws Ann. § 764.1(1) (West 1982); see generally *People* v. *Mallory*, 421 Mich. 229, 365 N.W.2d 673 (1985).

[3] At that preliminary examination, respondent stipulated that the police officers found a total of 4.56 grams of cocaine in 20 separate small envelopes during the May 8 search. See Dec. 23, 1986, Tr. 5. The prosecution's only witness, Detroit Police Officer James Willis, testified that other persons were in the salon during the search. He was unable to describe the piece of paper retrieved from the jacket, other than recalling that respondent's name and the salon's address appeared on it. He did not know whose jacket it was and suggested that the police had not even taken the jacket. See *id.* at 6-9.

The court summarized its probable cause determination as follows (Dec. 23, 1986, Tr. 14):

> The testimony [of the police officer] is that the jacket was in close proximity to [respondent] and some proof of – some paper with [respondent's] name on it was in that jacket. That is not con-

2. In the Recorder's Court, respondent filed a pretrial motion to dismiss the complaint on the ground that the "unwarranted delay" of 225 days between his initial arrest and arraignment rendered him unable to prepare a defense and amounted to a violation of "due process of law" (Resp. Mot. To Dismiss For Denial Of Due Process 2 (Feb. 6, 1987), *People* v. *Leigh*, No. 87-00032 (Mich. Rec. Ct.)). Respondent alleged that the jacket containing the cocaine was not his and that other persons who were in the salon on May 8 would have been able to identify the jacket's owner. Respondent therefore contended that as a result of the long delay in filing the complaint his "memory had faded, witnesses had moved, and their whereabouts are unknown. People who were present at the time of the execution of the search warrant cannot be recalled" (*ibid.*). The state trial court held a hearing on respondent's motion.[4]

Sergeant Franscott Fowler, a member of the Narcotics Section of the Detroit Police Department and the officer in charge of the May 8, 1986, search of respondent's salon, was the only witness at the hearing. Fowler testified that sometime in May 1986, after the search and initial arrest, he asked the Wayne County Prosecuting Attorney's Office to lodge formal criminal charges against respondent. That Office would not do so until laboratory analyses of the cocaine were completed and certain clerical changes were made in the officers' reports. Those clerical changes, which amounted to nothing more than adding several evi-

---

clusive by any means but it does I think cross the threshold of probable cause and the Court is finding based on the evidence which could be better than it is but for purposes of this examination is sufficient to find probable cause to charge [respondent] as he is charged.

[4] The prosecutor apparently did not file a written opposition to respondent's motion, as none appears in the record.

dence identification numbers to the reports, required only five minutes of Fowler's time. The laboratory analyses, however, which were requested on May 8 and 9, were not completed until August 30, 1986; a shortage of technicians caused that delay. In December 1986 Sergeant Fowler again requested the prosecutor to file charges against respondent. He had no explanation for why he waited until December to do so. Pet. App. 4a-5a; Br. in Opp. App. 7, 10-13, 14-16, 17-20.

At the close of the hearing, the prosecutor urged the court to deny respondent's motion, principally because "there has been no substantive evidence or even any testimony that there has been any prejudice" (Br. in Opp. App. 32).[5] In any event, the prosecutor argued that delaying the filing of the criminal complaint until December could not have prejudiced respondent since he knew in May that he could face narcotics charges. The prosecutor thus contended that respondent "had the opportunity at that time to gather up any names of any persons that were in his shop or any witnesses that he wanted to talk to. He had an opportunity to do all that and he didn't do it. He chose not to do it." *Ibid.*

3. The state trial court granted respondent's motion and dismissed the complaint (Br. in Opp. App. 32-36). The court followed *People* v. *Hernandez,* 15 Mich. App. 141, 146-147, 170 N.W.2d 851, 854 (1968), which called for weighing the prosecution's reasons for waiting to file criminal charges against the prejudice suffered by the defendant in determining whether that delay amounted to a denial of "procedural due process." The court found that

---

[5] Sergeant Fowler confirmed that the police had not taken the jacket in which the cocaine was found (Br. in Opp. App. 22-23). He mentioned that "[p]roof of ownership from the jacket was taken," but did not describe that document or paper (*id.* at 23).

the shortage of laboratory technicians caused the delay in filing charges, and that the prosecution had not deliberately sought or caused the delay (Br. in Opp. App. 33-34). Indeed, the court stated that "the intentions of the police seem to be within reason, they are just working with a very difficult situation or were working with a very difficult situation at that time" (*id.* at 35-36). Nevertheless, the court found that the delay caused respondent "undue prejudice," principally because he "would have a tough time defending himself against [the] charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time" (*id.* at 35). Accordingly, the court concluded that such undue prejudice outweighed the prosecution's reasons for waiting to file charges and thus required the dismissal of the complaint (*id.* at 36).

4. The Michigan Court of Appeals affirmed (Pet. App. 1a-8a). It relied on *People* v. *Bisard,* 114 Mich. App. 784, 319 N.W.2d 670 (1982), which refined the *Hernandez* standard for determining whether the prosecution's delay in filing charges denied the defendant due process of law. According to the *Bisard* court, "once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted" (*id.* at 791, 319 N.W.2d at 673). In so holding, the court expressly rejected the State's contention that a defendant must show "actual and substantial prejudice and purposeful delay to gain tactical advantage" in order to establish a due process violation (Pet. App. 7a).

Observing that respondent's defense "was that the yellow jacket containing the cocaine was not his and was too small to fit him" (Pet. App. 3a), the court of appeals accepted the trial court's finding that the delay had prejudiced respondent because he "had forgotten the names of

everyone present on May 8 and had been unable to locate some of those persons whose presence he did recall and who might know to whom the jacket belonged" (*id.* at 4a). The court of appeals also upheld the trial court's finding that the reason for the delay, the shortage of laboratory technicians, was not sufficient to justify the delay. In any event, it noted that the prosecution's explanation "completely failed to account for 94 days of delay" (*id.* at 8a). Accordingly, the court agreed with the trial court that "on balance, the prejudice to [respondent] outweighed the reasons provided by the state for the delay" (*ibid.*).

5. On September 13, 1988, the Michigan Supreme Court, with two justices dissenting, denied the State's application for leave to appeal (Pet. App. 9a-10a).

DISCUSSION

Following this Court's decision in *United States* v. *Lovasco*, 431 U.S. 783 (1977), federal and state courts have divided over the proper standard for determining if the prosecutor's delay in filing criminal charges amounts to a violation of the Due Process Clause. In particular, the lower courts have disagreed about whether a defendant, in addition to showing actual prejudice, must establish that the prosecutor delayed filing charges in order to gain a tactical advantage over the defendant or to advance some other impermissible purpose. We thus agree with petitioner (Pet. 15-18) that this conflict over an important question of constitutional law merits the Court's attention.

Nevertheless, this case may not be an appropriate vehicle for addressing that issue. The Michigan state courts did not explicitly resolve the case on the basis of federal constitutional grounds. Moreover, the record suggests that the "prejudice" to respondent found by the state courts was not the kind of prejudice that is required to satisfy the first

part of the due process inquiry under federal standards. It may therefore not be necessary for the Court in this case even to reach the significant issue that has divided the lower courts. Finally, this Court's recent decision on a closely related due process issue, *Arizona* v. *Youngblood,* 109 S. Ct. 333 (1988), may well have the effect of settling the dispute among the lower courts as to the proper standard to use in determining whether a prosecutor's delay can justify dismissal even in the absence of bad faith by law enforcement authorities. We therefore recommend that this case be remanded to the Michigan courts for further consideration in light of this Court's decision in *Arizona* v. *Youngblood.*

1. This Court explained in *United States* v. *Lovasco,* 431 U.S. 783, 789 (1977), that the principal protection against preindictment delay is the applicable statute of limitations. Nonetheless, the Court held, the Due Process Clause has a role, albeit a limited one, "in protecting against oppressive delay" in the filing of criminal charges. That limited constitutional protection, the Court held (*id.* at 789-790), is available only when the defendant's claim satisfies a two-part test. The defendant must actually have been prejudiced by the delay, and the government's reasons for the delay must be such as to make compelling the defendant to stand trial a violation of those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency" (*id.* at 790 (citations and internal quotation marks omitted)). The Court then held that, while the second part of that test could be satisfied where the government sought " 'to gain tactical advantage over the accused' " (*id.* at 795 (quoting *United States* v. *Marion,* 404 U.S. 307, 324 (1971)), it is not satisfied by investigative delay – *i.e.,* fundamental conceptions of justice are not offended when the delay is due to

the government's continued criminal investigation (431 U.S. at 791-796). Such "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused' " (*id.* at 795 (citation omitted)).

State and federal courts have adopted roughly two approaches in applying the *Lovasco* standard. Most courts have stated that relief is available only if the defendant is prejudiced and the government intended to delay the initiation of proceedings in order to obtain a tactical advantage over the defendant. *E.g., United States* v. *Ismaili,* 828 F.2d 153, 166 (3d Cir. 1987), cert. denied, 108 S.Ct. 1110 (1988); *United States* v. *Hoo,* 825 F.2d 667, 671 (2d Cir. 1987), cert. denied, 108 S. Ct. 742 (1988); *United States* v. *Lebron-Gonzalez,* 816 F.2d 823 (1st Cir.), certs. denied, 108 S. Ct. 135, 166 (1987); *United States* v. *Caporale,* 806 F.2d 1487, 1514 (11th Cir. 1986), certs. denied, 107 S. Ct. 3195, 3265 (1987); *United States* v. *Jenkins,* 701 F.2d 850, 854 (10th Cir. 1983); *United States* v. *Atisha,* 804 F.2d 920, 928 (6th Cir. 1986), cert. denied, 479 U.S. 1067 (1987); *State* v. *Hall,* 395 N.W.2d 640, 642 (Iowa 1986); *State* v. *Nelson,* 719 S.W.2d 13, 20 (Mo. App. 1986); *State* v. *Baker,* 614 S.W.2d 352, 354 (Tenn. 1981). That reading of *Lovasco* is in accord with this Court's description of the standard for Fifth Amendment relief from preindictment delay in *United States* v. *Gouveia,* 467 U.S. 180, 192 (1984).[6] See also *Arizona* v. *Youngblood,* 109 S. Ct. 333, 337 (1988); *id.* at 341 n.5 (Blackmun, J., dissenting).

[6] The *Gouveia* Court stated (467 U.S. at 192 (footnote omitted)) that, beyond the protection from preindictment delay furnished by the applicable statute of limitations, "the Fifth Amendment requires dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. *United States* v. *Lovasco, supra,* at 789-790; *United States* v. *Marion, supra,* at 324."

On the other hand, a minority of federal and state courts have articulated various versions of more relaxed approaches to applying *Lovasco*. Those courts have not required an intentional seeking of tactical advantage or recklessness on the part of the prosecution, but have suggested or held that less reprehensible governmental reasons for delay, assessed in light of the prejudice caused by the delay, can be sufficient to establish a violation of the Due Process Clause. See, *e.g.*, *United States* v. *Moran*, 759 F.2d 777, 782-783 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986); *People* v. *Lawson*, 67 Ill. 2d 449, 460-461, 367 N.E.2d 1244, 1249 (1977); *People* v. *Nuss*, 405 Mich. 437, 452-456, 276 N.W.2d 448, 454-456 (1979); *State* v. *Luck*, 15 Ohio St. 3d 150, 157, 472 N.E.2d 1097, 1105 (1984); *State* v. *Anderson*, 46 Wash. App. 565, 567, 731 P.2d 519, 521 (1986).[7]

2. While state and federal courts are divided on the issue the State presents in this case, this case may not be a proper vehicle for this Court to grant plenary review to address that issue, for several reasons.

a. This case presents a threshold question whether the decision below rests on an adequate and independent state

---

[7] The Fifth, Seventh, and Eighth Circuits have been inconsistent in their approaches. Some decisions have required intentional seeking of tactical advantage or similar advantage-seeking conduct or impermissible reasons. *E.g.*, *United States* v. *Scott*, 795 F.2d 1245, 1249-1250 (5th Cir. 1986); *United States* v. *Watkins*, 709 F.2d 475, 479 (7th Cir. 1983); *United States* v. *Bartlett*, 794 F.2d 1285, 1293 (8th Cir. 1985), cert. denied, 479 U.S. 934 (1986). Other decisions have articulated more flexible approaches. *E.g.*, *United States* v. *Townley*, 665 F.2d 579, 581-582 (5th Cir.), cert. denied, 456 U.S. 1010 (1982); *United States* v. *Taylor*, 603 F.2d 732, 735 (8th Cir.), cert. denied, 444 U.S. 982 (1979). See *Dickerson* v. *Louisiana*, 816 F.2d 220, 229 n.16 (5th Cir.), cert. denied, 108 S.Ct. 352 (1987); *United States* v. *Hollins*, 811 F.2d 384, 387-388 (7th Cir. 1987), cert. denied, 108 S.Ct. 742 (1988).

ground. In his motion to dismiss the complaint, respondent did not expressly invoke any federal right.[8] He simply contended that the prosecutor's delay "denied [him] due process of law," citing two Michigan state court decisions and making a passing reference to an Illinois state court decision, only the latter of which explicitly based its holding on the Due Process Clause of the Fourteenth Amendment (Resp. Mot. To Dismiss For Denial Of Due Process 2, 3 (Feb. 6, 1987), *People* v. *Leigh*, No. 87-00032 (Mich. Rec. Ct.)).[9]

---

[8] Before the Michigan Court of Appeals, respondent specifically invoked both the Due Process Clause of the Fourteenth Amendment and its counterpart in the Michigan State Constitution in urging that court to uphold the trial court's dismissal of the complaint (Resp. Reply Br. 9, *People* v. *Leigh*, No. 99662 (Mich. Ct. App.)).

[9] Respondent cited *People* v. *Hernandez*, 15 Mich. App. 141, 170 N.W.2d 851 (1968), and *People* v. *Bisard*, 114 Mich. App. 784, 319 N.W.2d 670 (1982), and made a passing reference to *People* v. *Lawson*, 67 Ill.2d 449, 367 N.E.2d 1244 (1977).

In *Hernandez*, the Michigan Court of Appeals set a standard for determining whether the prosecution's delay in filing charges amounts to a violation of "procedural due process," but did not mention either the federal or state constitution (15 Mich. App. at 147, 170 N.W.2d at 854). The court did, however, rely on *Ross* v. *United States*, 349 F.2d 210 (D.C. Cir. 1965) (per curiam), which held that the government's delay in charging the defendant violated the Due Process Clause of the Fifth Amendment. In *Bisard*, the Michigan Court of Appeals, again without referring to either the federal or state constitution, refined the *Hernandez* standard "in light of subsequent interpretations of due process law by the United States Supreme Court [in *Marion* and *Lovasco*]" (114 Mich. App. at 788, 319 N.W.2d at 672). Citing both federal and other state court decisions, including the Illinois Supreme Court's decision in *Lawson*, the *Bisard* court rejected a standard that would require a defendant "to prove both actual prejudice and unexplainable delay" (*id.* at 789, 319 N.W.2d at 673). Instead, the court read *Lovasco* as endorsing the following test to determine whether a defendant has been denied "his right to due process of law": "once a defendant has shown some prejudice, the prosecution bears the

The Michigan state courts did not explicitly resolve this case on the basis of federal or state constitutional grounds. Instead, the state trial court, citing only *People* v. *Hernandez, supra* (see note 9, *supra*), framed the issue as whether respondent's "Constitutional Rights * * * have been violated" (Br. in Opp. App. 33). And the appellate court, citing only Michigan state court decisions,[10] similarly considered whether the "delay in instituting prosecution denies [respondent] due process" (Pet. App. 3a).

In general, the Michigan state courts do not appear to treat the claim of prejudicial delay in filing criminal charges solely as a matter of state constitutional law. See note 9, *supra*. Indeed, the Michigan Supreme Court has resolved that issue based on an intertwining of federal and state constitutional law. See *People* v. *Nuss*, 405 Mich. 437, 452-453 & n.9, 276 N.W.2d 448, 454 & n.9 (1979).

In *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983), this Court made clear that when a state court decision "fairly appears * * * to be interwoven with the federal law,

---

burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted" (114 Mich. App. at 791, 319 N.W.2d at 673).

In *Lawson*, the Illinois Supreme Court expressly considered challenges to the prosecution's delay in filing charges as arising under the Due Process Clause of the Fourteenth Amendment (67 Ill. 2d at 456, 367 N.E.2d at 1247). The court also treated *Lovasco* as approving a standard that involved "balancing the actual and substantial prejudice to the defendant with the reasonableness of or reasons for the delay" (67 Ill. 2d at 461, 367 N.E.2d at 1249).

[10] Apart from relying on *Bisard* (see note 9, *supra*), the court cited *People* v. *Shelson*, 150 Mich. App. 718, 389 N.W.2d 159 (1986), *People* v. *Dungey*, 147 Mich. App. 83, 383 N.W.2d 128 (1985), and *People* v. *Vargo*, 139 Mich. App. 573, 362 N.W.2d 840 (1984). *Shelson*, *Dungey*, and *Vargo* simply recite and apply the standard set forth in *Bisard* without referring either to the federal or state constitution.

and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." See also *Harris* v. *Reed,* No. 87-5677 (Feb. 22, 1989), slip op. 4-5. Here, a close look at the relevant Michigan state court decisions shows that those cases relied on federal constitutional rulings and were thus "interwoven with federal law." See note 9, *supra.* Thus, while the matter is not entirely free from doubt, it appears that the decision below does not rely on the Michigan constitution alone. Under the *Michigan* v. *Long* presumption, this Court's jurisdiction is therefore not barred by the existence of an adequate and independent state ground.

b. A second problem with this case that may render it unsuitable as a vehicle to resolve the issue on which the lower courts are divided concerns the finding of prejudice by the Michigan courts. Those courts based their finding of prejudice in this case on factors that would not have been legally sufficient to constitute prejudice under the prevailing standards. Accordingly, the first part of the two-part due process test—the showing of prejudice—may not have been satisfied in this case, making it unnecessary for the Court to reach the question whether the second part of the test requires a showing of bad faith on the part of the prosecution.

The Michigan courts concluded that the 225-day delay between respondent's initial arrest and his arraignment on formal charges prejudiced his defense in two respects: respondent would be unable to remember or locate eyewitnesses who might identify the owner of the jacket containing the seized cocaine, and respondent could not retrieve the jacket which the police had never seized in order to show it could not have belonged to him. See Pet. App.

3a-4a; Br. in Opp. App. 35-36. The problem with that claim of prejudice is that it does not relate to any period of unreasonable delay that there may have been in bringing the charges in this case. First, respondent knew from the day of his initial arrest that he might face narcotics charges. Yet he proffered no explanation for his decision, at that time, not to take note of the customers in his salon. And respondent proffered no reason for connecting his apparent inability to locate those customers he could remember with the seventh-month delay in filing charges. Courts have routinely rejected such speculative and conclusory assertions of prejudice in determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause. See, *e.g.*, *United States* v. *Wallace*, 848 F.2d 1464, 1470 (9th Cir. 1988); *United States* v. *Ismaili*, 828 F.2d at 168-169; *United States* v. *Brock*, 782 F.2d 1442, 1444 (7th Cir. 1986); *United States* v. *Jenkins*, 701 F.2d at 855.

Second, respondent's claim of prejudice stemming from his inability to locate the jacket is not compelling, because respondent has failed to show that he might have been able to locate the jacket if charges had been brought after what the court would have considered a reasonable delay. Thus, there was no showing that the unavailability of the jacket resulted from the delay in filing the criminal charges. See *United States* v. *Mills*, 641 F.2d 785, 789 (9th Cir.) (finding that even if the government had indicted defendants one month after the crime, the physical evidence could have been unavailable), cert. denied, 454 U.S. 902 (1981). Because respondent has not shown the requisite prejudice, this Court would not need to reach the significant issue that has divided the lower courts, *i.e.*, whether the defendant must also show that the prosecutor delayed filing charges in order to gain a tactical advantage over the defendant.

c. A third factor weighing against plenary review in this case is this Court's recent decision in *Arizona* v. *Youngblood,* 109 S. Ct. 333 (1988), which may make it unnecessary for this Court ever to address the issue presented here. In *Youngblood,* the Court held that the failure by the prosecution to preserve potentially useful evidence does not result in a due process violation unless the defendant can show bad faith on the part of the police. *Id.* at 337. If, as the Court held in *Youngblood,* the intentional or negligent destruction of potentially useful evidence does not violate due process unless it is done in bad faith, there is no justification for a different rule when a delay in bringing charges is held to be prejudicial because it has exactly the same result—the loss of potentially useful evidence. That was the basis on which the Michigan courts dismissed the complaint in this case, an action that was taken before this Court's decision in *Youngblood.* Accordingly, it would appear quite likely that if the Michigan courts have occasion to reconsider their ruling in light of *Youngblood,* the result in this case will be different, at least to the extent that the Michigan courts were relying on federal law as the basis for their ruling.

In addition to the conflict in analysis between *Youngblood* and the decision below, the *Youngblood* case contains language that specifically addresses the issue of preindictment delay and strongly supports the majority view that bad faith on the part of the prosecution is an essential element of the due process test. Citing *Marion* and *Lovasco,* the *Youngblood* Court noted that in related areas the Court has "stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government." 109 S. Ct. at 337. The Court noted that the good or bad faith of the State is irrelevant "when the State fails to disclose to the defendant

material exculpatory evidence." *Ibid.* But where the prejudice to the defense consists of the failure to preserve evidence that *might have* exonerated the defendant, as in this case, the Court held that due process is not denied in the absence of proof of bad faith. *Ibid.* The Court's characterization of the *Marion-Lovasco* line of cases, a characterization not disputed by the dissenting Justices, see *id.* at 341 n.5 (Blackmun, J., dissenting), would likewise appear to resolve the issue presented in this case.

Because of the problems presented by the record in this case, and because the issue both in this case and in others raising the same question may well be resolved by this Court's analysis in *Arizona* v. *Youngblood, supra,* we do not believe that plenary review is appropriate in this case at this juncture. Rather, we recommend that the case be remanded to the state courts for further consideration in light of this Court's recent decision in *Arizona* v. *Youngblood.*

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case to the Michigan Court of Appeals for further consideration in light of this Court's decision in *Arizona* v. *Youngblood,* 109 S. Ct. 333 (1988).

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

MARCH 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00147

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF MICHIGAN,

Petitioner

vs.

REGINALD D. LEIGH,

Respondent.

U.S. Supreme Ct. No.: 88-557
Michigan
Court of Appeals #: 99662
Detroit Recorder's Ct. #
87-00032

ORIGINAL

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

.....

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

.....

REGINALD D. LEIGH, Respondent
438 Mt. Vernon
Detroit, Michigan 48226

JERROLD B. SHERMAN (P 20359)
Of Counsel
24100 Southfield, Ste. 213
Southfield, Michigan 48075
(313) 569-1600

60 pp

TABLE OF CONTENTS

INDEX OF AUTHORITIES	ii
STATEMENT OF THE QUESTION PRESENTED:	iii
STATEMENT OF FACTS	1
ARGUMENT	10
RELIEF	14

INDEX OF AUTHORITIES

People v Bisard, 114 Mich App 784 (1982) 12, 13

People v Hernandez, 15 Mich App 1414 (1968) 7, 8, 11,12,13

People v Lawson, 67 Ill 2d 449; 10 Ill Dec 478; 3678 NW2d 1244 (1977) 13

Unites States v Lovasco, 431 US 783; 97 SCp 2044; 52 L Ed2d 752 (1977) 12

OTHER AUTHORITES

US Constitution, Amendment XIV; Michigan Constitution 1963; Art. 1, Sec. 17 11

STATEMENT OF THE QUESTION PRESENTED

I. DOES A 225 DAY DELAY FROM THE ARREST OF DEFENDANT TO THE ISSUANCE OF A WARRANT, WHICH THE COURT FOUND UNDULY PREJUDICED THE DEFENDANT, CONSTITUTE A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS?

DEFENDANT-APPELLEE ANSWERS: "Yes"

PLAINTIFF-APPELLANT ANSWERS: "No"

COURT OF APPEALS ANSWER: "Yes"

STATEMENT OF FACTS

On May 8, 1986 the Respondent, REGINALD D. LEIGH, was arrested at his business, a beauty and barber shop, located at 9314 Woodward in the City of Detroit, Michigan and charged with possession with intent to deliver cocaine. He was held in custody for approximately three days and then released to appear without being arraigned and no warrant having been issued. A warrant was subsequently sought in December, 1986, some 225 days after the arrest.

A preliminary exam was held in the Detroit 36th Judicial District Court before the Honorable Ricardo Lubienski on Tuesday, December 23, 1986. Officer James Willis of the Detroit Police Department was called and testified at said exam. (Exam transcript, pg. 4, lines 5, 14):

> "A. I went immediately to the rear of the building. I began searching a room in that rear ... Upon searching that room immediately to my right hanging on a type of hanger was a yellow sport jacket. I searched the sport jacket. In the pocket of that sport jacket I retrieved a plastic baggie containing a bundle of yellow coin envelopes and proof of residence or ownership to that building we were in ..."

On page 6 of the exam transcript, line 1:

"Q Was anybody in the home besides himself?

A. This was a business; it was at a place of business, yes, there were other people in their."

Q. You say you went into the back and there was a jacket, a yellow jacket?

A sport coat, yes.

Q. In the pocket you found some cocaine?

A. yes, suspected narcotics. I didn't know what it was.

Q. All right, stipulated for the purposes of the record that was analyzed to be cocaine. Now who did the jacket belong to, sir?

A. I do not know who it belonged to other than the item that I retrieved from the pocket along with the narcotics that was turned over to Officer Pauley."

In the instant case, Respondent was charged with possession with intent to deliver cocaine. On February 13, 1987 Respondent brought a Motion to Dismiss based on a denial of due process argument.

In response to Respondent's motion, testimony was taken from Police Officer Franscott Fowler of the Detroit Police Narcotics Section. Officer Fowler testified that he was working on May 8, 1986 and that he was one of the officers responsible for executing a search warrant on Reggie's Hair Salon located at 9314 Woodward in the City of Detroit. (T 7) He further testified that as a result of that search Respondent was arrested.

After Respondent was arrested, a not-in-custody warrant (warrant which is issued when a defendant is released and not in the custody of the police department) was prepared. (T 8) Officer Fowler further indicated that there was a need for a laboratory analysis and that getting that analysis caused some delay because the lab was operating short of people. The shortage of lab people was one of the reasons why Petitioner's warrant was a not-in-custody warrant request. (T 9-10)

This initial warrant request was denied by the prosecutor in part because the lock seal folder numbers were missing from the PCRs, and in part because the lab analysis had not been completed. The lab analysis sheets were submitted to the lab the day after the arrest, May 9, 1986, yet the analysis was not completed until August 30, 1986. The officer further testified that he had no plan or scheme or desire to hold property from the Respondent. (T 10-11) Officer Fowler additionally indicated that he has no control over forfeiture actions which the prosecutor's office may seek to pursue. (T 12) After the

laboratory analysis was completed, a second warrant request was sought in December, 1986. (T 12-13) Officer Fowler further testified that Respondent was in "police custody" for about two days because after being arrested, he requested to go to the hospital. Respondent was thus in custody initially of his own choosing. He would otherwise have been released while a not-in-custody warrant was being sought. (T 25-26)

The statements made by Respondent's counsel contained specific allegations of prejudice, and certainly did indicate intentional delay on the part of the police or prosecution to gain tactical advantage over the Respondent. In stating that, based upon Officer Willis' testimony at the exam that there were many other people on the premises at the time of the raid, although not endorsed as res jestae witnesses, when Respondent argued:

> "No in that period of time, one, your memory is vague, people move, people change addresses. This is like two-thirds of the year. Then you come with a warrant and you don't have the jacket [which the police said they took narcotics out of, but did not take the jacket itself (T 22-23) and I don't know where the jacket is, whether it was taken by them or not.] But the officer who testified at the exam said they don't have the jacket. And, now you are going to say 'these narcotics that was found in the jacket, in an area where other people were found also belongs to the defendant.' With no jacket to try it on, no witnesses to testify who it may have belonged to. This puts the defendant in a position which is totally untenable and unjust. He could conceivably now get a hold of the people that could testify because of this delay. And, the delay, your honor, is unwarranted, unjustified. There is no reason for it, other than o the net result whether it was intentional or not, as to prejudice the defendant. The delay doesn't have to be intentional. It is the net result that it is an unexplainable delay and that inures to his prejudice and

certainly it is obvious that it so inures." (T 26-28)
(emphasis added)

Officer Fowler, when testifying at the hearing of the motion, testified on page 11, line 4 as follows:

"A. The date that they were conveyed to the lab was one day, the following morning after the arrest of Mr. Leigh.

Q. Was that May 9, 1986?

A. Yes

Q. And, were those laboratory analysis sheets completed by the Detroit Lab?

A. I think it was. The last one was 8-30-86.

Q. August 30, 1986?

A. Yes."

Officer Fowler went on to testify the problems that caused the delay in the obtainment of the warrant, the first being that the prosecutor's office wanted the lock seal folder numbers on the warrant request, and that is why the original request in May was turned down. On page 16 of the motion transcript, at line 16, a question was asked the sergeant:

"Q. All right. Sergeant, how long would it have taken someone to take these numbers that you already had and put them on the PCR's? A week?

A. No.

Q. A month?

A. Maybe five minutes."

The second reason given for the delay was that the lab was too busy to do the analysis. However, the officer testified on page 17 of the motion transcript at line 24:

> "Q. All right, And, the date that the analysis was complete and returned?
>
> A. The date started 5-8-86; dated completed; 5-8-86."

Continuing on page 18 of the motion transcript, line 17:

> "Q. No, would you tell me, when you had a positive analysis for a violation of VCS, the information to obtain a warrant, five minutes to put the numbers on the PCR, why it took 225 days to go ahead and get that warrant?
>
> Q. Well, first of all, sir, this was a pre-buy by an SOI and, second of all, the analysis we needed from the confiscations were confiscated were taken to the lab 5-9-86 by Tangiers. The technicians started work on this 8-29-86; the other 8-29-86 and completed that same day, 8-30-86."

Page 19 of the motion transcript, line 7:

> "Q. When did you obtain the warrant?
>
> A. I think it was December — I don't know the date it may be the 5th.
>
> Q. Okay, let's see, 8-30 to 11-30 to 10-30 to 11-30, that's 90, 90 some days after you received the return of this analysis, right?
>
> A. Yes."

No additional testimony was offered as to any reason for the additional delay.

It is interesting to note that the Request for Remission for return of seized items by the Detroit Police Department from the Respondent was filed October 20, 1986, and on December 5, the warrant

for Respondent's arrest was issued.

The trial prosecutor argued to the court that Respondent has no right to be arrested, and that Respondent has misapplied the law as it relates to a due process, speedy arrest claim. (T 28-32)

The court then ruled as follows:

"Now, it is my understanding that there are two motions that have been presented by Mr. Sherman. The first motion he argued it, and that motion complains that because of a delay of 225 days from the time of the alleged criminal activity and the arrest that this client has been unduly prejudiced and his constitutional rights therefore have been violated and for that reason this case should be dismissed.

This case, to me, is somewhat similar to the case of People v Hernandez in which there was a delay of some 42 days. There was a situation whether there had been a dope — alleged dope transaction, drug transaction, purchase made and later a search warrant executed upon a home. And there was 42 days from that alleged incident that the defendant in the case was subsequently arrested and charged with the drug offense. And, the court reviewing that situation and a pointed out by defense counsel, one

of the considerations in that case was the fact that this person, the defendant was illiterate and it appeared certainly in that cause, that he had very little understanding what was occurring. But, the court went on in the Hernandez case to set out the guidelines which are violated. One of the things that they looked at is whether or not the delay is explainable. And in our case, the case that we have before us today, I believe Sergeant Fowler has explained the delay. Whether or not that prejudiced the defendant is another matter, but he has given an explanation.

He has indicated at that time the lab had a personnel shortage and, I think it is pretty common knowledge that there was a shortage of chemists in that department which backed up the analysis that they were performing. The other thing that we look at is whether or not the delay is deliberate.

Now, Mr. Sherman suggests in his argument that because of a motion filed to return property and the like that there might have been something under the table that made this deliberate. I don't see it that way. The important issue though is whether or not the delay of some 225 days caused this defendant undue and I believe that Mr.

Sherman has made a pretty good case, in my opinion, in support of that.

First of all, we are dealing here with a business establishment. Officer Fowler has indicated that it was a beauty-type barber shop type of business and one would expect large numbers of people coming and going from that type of establishment. He indicated that the drugs were found in one jacket. He, for purposes of hearing, was not able to clearly identify where the other drugs were found.

The jacket, according to Sergeant Fowler, was not confiscated. He indicated that they did have proof of residency and, apparently, they are relying on that. But, the court case, the case of Hernandez and the other cases which are in this area, look to whether or not the delay — and there is no particular number of days involved — but whether or not sufficient time has expired that would cause the defense. And the defense have said they have trouble finding out who was there, and that is understandable.

It is a business place. They have trouble finding out who was there at that time who could give testimony in

their behalf. They also indicated that they have a problem remembering the details of the situation with the expiration of the time that was involved here..."

The Recorder's Court Judge in dismissing the case found:

"Now I believe that looking at this matter of balance that this defendant would have a tough time defending himself against these charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time. And, there is, in my opinion, undue prejudice because of the delay. And, at this time, although the intentions of the police seem to be within reason, they are just working with a very difficult situation at that time. But it appears that this defendant would be unduly prejudiced to permit this to continue and for what reason the complaint is dismissed and the defendant is discharged from this complaint." (T 32-36) (page 35, Motion transcript at line 19) (emphasis supplied)

ARGUMENT

In the instant case, the trial court found that there was undue prejudice in the 225 day delay between the time of arrest of the Respondent when he was held in custody for three days and then

released to appear, and the commencement of the prosecution by the obtainment of a warrant 225 days after the initial arrest. Respondent's right of due process under the U.S. Constitution, Amendment XIV, and the Michigan Constitution of 1963, Article 1, Section 17 which states "...nor shall any state deprive any person of life, liberty, or property without due process of law..." The trial court agreed with Respondent's contention, having found undue prejudice because of the delay.

The prosecution contended that the delay was caused by the Detroit Police lab being so over-burdened that it could not complete the analysis of the seized evidence within a reasonable time. The testimony clearly shows that, taken in the light most favorable to the prosecution, all the analysis was completed by August 30. However, the warrant for the re-arrest of the Respondent was not obtained until December 5, 1986. The period in excess of 90 days was not explained by the prosecution at all. No reason was given for the additional 90 plus day delay. It is interesting to note that when the Respondent, on October 20, 1986 filed for the return of his seized property, that it was shortly therafter, to wit, December 5, that the prosecution obtained the warrant.

In People v Hernandez, 15 MI App 141 (1969), the court laid down a three prong test and stated:

> "Once some prejudice is shown, the prosecution has the burden to prove:
>
> (1) an explanation for the delay; (2) the delay was not deliberate; (3) there is no undue prejudice."

In People v Bisard, 114 MI App 784 (1982), the court somewhat modified the Hernandez test and stated:

> "Where there has been a delay between an alleged criminal transaction and the arrest of a defendant and where the defendant has shown some prejudice as a result of the delay, the prosecutor bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted; the burden of coming forward with evidence of prejudice is on the defendant, who is most likely to have facts regarding prejudice at his disposal; the burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibility for determining when an investigation should end.

The burden of persuading the court the prejudice was caused is on the Respondent. The Respondent in the instant case has demonstrated to the court:

(1) evident, to wit, the yellow jacket was missing;

(2) That people who were present in the shop at the time were unknown to him 225 days later;

(3) That although many people were present, as per the testimony of Officer Willis, these people were not listed as res jestate witnesses.

The Respondent has clearly established and the court agreed that undue prejudice was caused him by the delay. In People v Bisard, supra the court cited US v Lovasco, 431 US 783; 97 SCp 2044; 52 Law Ed 2d 752 (1977), and stated that a two part test to be used in a due process inquiry. First, the court observed that "proof of prejudice

is generally a necessary but not sufficient element of a due process claim." Second, the court held that, in addition to the consideration of prejudice, a court was to explore the reason for the delay. In the Bisard case, which in part adopts Lovasco, at pg. 789, the court stated:

> "Under Hernandez, any finding of undue prejudice would suffice to establish a due process violation, but Lovasco holds that a showing of actual prejudice is insufficient. In considering the problem, we observe that there was no finding of undue prejudice in Lovasco, only a finding by the lower court of some actual prejudice."

In the instant case, again the court in its findings found undue prejudice.

In People v Lawson, 52 Ill 2d 449; 367 NE 2d 1244 (1977), the Illinois court found that once a defendant has shown some actual and substantial prejudice, the burden shifts to the prosecution to show the reasonableness of the delay. The Illinois courts must then weigh the reasons for the delay against the seriousness of the prejudice resulting from the delay.

In the Bisard case, the Michigan Court of Appeals adopted the Lawson test, which, in fact, was followed by the lower court. In the instant case, the court stated:

> "Now I believe that looking at this matter of balance that this defendant would have a tough time defending himself against these charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time. And, there is, in my opinion, undue prejudice because of the delay. And, at this time, although the intentions of the police seem to be within reason, they are just working with a very

difficult situation at that time. But it appears that this defendant would be unduly prejudiced to permit this to continue and for what reason the complaint is dismissed and the defendant is discharged from this complaint." (T 32-36) (page 35, Motion transcript at line 19) (emphasis supplied)

RELIEF

The Respondent respectfully requests that this . cable Court affirm the dismissal granted by the trial court and

REGINALD D. LEIGH, Respondent
In Pro Per

JERROLD B. SHERMAN (P 20359)
Of Counsel
24100 Southfield, Ste. 213
Southfield, Michigan 48075
(313) 569-1600

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

v File No. 87-00032

REGINALD DAVID LEIGH,

Defendant.
_____/

MOTION TO DISMISS FOR DENIAL OF DUE PROCESS

BEFORE THE HONORABLE PRENTIS EDWARDS, RECORDER'S COURT

DETROIT, MICHIGAN - FRIDAY, FEBRUARY 13, 1987

RECEIVED BY
CHIEF, CRIMINAL [illegible]ION
RESEARCH, TRAINING & APPEAL
JUL 31987

APPEARANCES:

For the Plaintiff: JEREMY BRAND

For the Defendant: JERROLD B. SHERMAN

Reported by: VERA D. BEAUFORD, CSR-0080

CERTIFIED OFFICIAL COURT REPORTER

REPORTERS PAPER & MFG. CO. 800 826 6113

TABLE OF CONTENTS

MOTION TO DISMISS BY MR. SHERMAN 3

RESPONSE TO MOTION BY MR. BRAND 6

WITNESSES: PEOPLE

FRANSCOTT FOWLER

Direct Examination by Mr. Brand 6
Cross-Examination by Mr. Sherman 13

Witness Examined by the Court 21

Cross-Examination Continued by Mr. Sherman 24

Statement by Mr. Sherman 27

Statement by Mr. Brand 28

Court's Ruling 32

TABLE OF CONTENTS

EXHIBITS:	MARKED	RECEIVED
DX#1 through 5	17	

Detroit, Michigan

Friday, February 13, 1987

- - -

THE CLERK: People versus Reginald David Leigh. The Case Number is 87-00032. The charge is Possession With Intent to Deliver Cocaine. A hearing is scheduled.

MR. SHERMAN: Good morning, Your Honor. Jerrold Sherman on behalf of Mr. Leigh.

MR. BRAND: Jeremy Brand for the People, your Honor.

MR. SHERMAN: Your Honor, I have brought two motions, and the one I would like to address first or initially, would be the motion to dismiss for denial of due process.

Your Honor, a Search Warrant was issued for Reggie's Styles Unlimited Salon on May 8th, 1987--1986, I am sorry. At that time, the defendant was arrested and subsequently discharged, told to call in and see whether a warrant was issued.

I appeared at the 36th District Court. They had held the defendant in custody for two days. I was about to get a writ when the Narcotics Squad and the Prosecutor's Office agreed to release the defendant at that time to me and see if there was

some trouble getting a warrant.

Some 225 days from the date of that arrest elapsed until a warrant was issued. Mr. Leigh, on numerous occasions and I, myself, on numerous occasions, contacted the Detroit Police Narcotics Squad to find out if a warrant was going to be issued and when they wanted him in. They kept saying, "No warrant has been issued. No warrant has been presented. We will let you know; keep calling back."

So, sometime the latter part of September, I filed with the Forfeiture Unit to get back his personal property that was seized at the time of his arrest, personal jewelry, et cetera. December the 2nd, a warrant was issued.

Your Honor, in the police writeup and the testimony, the Preliminary Examination, clearly shows that not only was Mr. Leigh present in the shop but that there were employees and many customers in the shop. The factual situation that leads to a warrant being issued for Mr. Leigh, is based on some narcotics that was found, not on the defendant but in a jacket hanging with some other clothes in the shop.

The jacket, one, does not belong to the defendant, was never tried on the defendant. There

is no showing that the jacket was his. There is a showing by the testimony, even of the police officer at the Preliminary Examination that everybody would have had access to that area.

We have numerous witnesses which will testify that customers use that room to watch TV while they were waiting for their turn to change their clothes while they were waiting to be cared for. There is no link of this jacket to Mr. Leigh, but that's not the critical thing. The critical thing is, your Honor that during 225 days, we don't know who all the people were that were in that shop, who all the customers were. We don't know where -- we tried to locate a couple of them we know. Some of them, we were unable to locate.

These witnesses may well have been able to tell the Court whose jacket it was or identify that jacket. This or the 225 day delay that has innured is insurmountable prejudice, your Honor. It has not permitted the defendant to prepare for his defense.

I would call the Court's attention, just very briefly to People v Hernandez 15 Mich Appeals 141 where the Court said that a delay of 42 days was excessive.

People v. Bisard 114 Mich Appeals 784

said 196 days from the date to advance that was held to be denial of due process. The Court specifically laid down the ruling that all the defendant has to do to show that he is prejudiced and then the burden is on the Prosecution to show good faith and adequate reason for delay.

Here we have a delay of 225 days, virtually two-thirds of the year and then they come up with this warrant. And when I asked the officer, I said, "You have the jacket that this narcotics, these narcotics were allegedly found in, because the inventory on the return shows that." He says, "No, we didn't take it, or I don't think we took it because we haven't got it marked into evidence."

That type of prejudice is definitely without any question, your Honor, a denial of due process.

MR. BRAND: I offer proposed testimony on behalf of my response, your Honor. Sergeant Fowler, would you take the witness stand and be sworn in.

FRANSCOTT FOWLER

was called by the People, sworn by the Court, testified:

DIRECT EXAMINATION

BY MR. BRAND:

Q State your name for the record, please?

A Franscott Fowler.

Q And, were you working with the Narcotics Section on May 8, 1986 in the City of Detroit Police Department?

A I was.

Q And, were you one of the officers in charge of an execution of a Search Warrant at Reggie's Hair Salon at 9314 Woodward in the City of Detroit, on Thursday, May 8, 1986?

A I was.

Q And, was that Search Warrant executed?

A It was.

Q And, did there come a point in time after the Search Warrant was executed that a person was arrested by the name of Reginald David Leigh?

A Yes.

Q Do you see that person in Court today?

A I do.

Q Would you point to that person?

A The gentleman seated with Counsel in the black shirt, dark grey pants.

MR. BRAND: I would ask the record to reflect, the witness has identified the defendant.

Q (By Mr. Brand, continuing): Did there come a point in

time where you prepared what is known as an Investigator's Report for submission to the Prosecuting Attorney's Office for Wayne County and your efforts to request a warrant in this case?

A It was prepared under my supervision by Officer Pauley.

Q Do you know what a Not-in-Custody Warrant is, sir?

A Yes, I do.

Q Could you explain to the Court what a Not-in-Custody Warrant is?

A A Not-in-Custody Warrant is a Warrant which is to be issued, having the person or the accused, the defendant not-in-custody of the Detroit Police Department.

Q Do you recall in fact whether a Not-in-Custody Warrant was used in this case regarding Reginald Leigh?

A There was a Not-in-Custody Warrant used in the case of Mr. Leigh.

Q Does that mean that he, in fact, was arrested on May 8 but was released with instructions that the Detroit Police Department would later be seizing a warrant from the Prosecuting Attorney's Office?

A That is correct.

Q Who would give those instructions for delaying in the normal course of Detroit Police procedure?

A In the normal procedure, it would be the Prisoner Processing Unit.

MR. SHERMAN: Well, I am going to object at this point, your Honor. One, the answer is speculative, that it was ever given to Mr. Leigh, with the fact that he did call. Second of all, he was not present; third of all, he didn't give it. So, it is strictly hearsay and, therefore, not admissible.

THE COURT: Well, I think the question is, what the procedure would be if the warrant was executed and he has given a response which gives the police procedure in the situation. I think under those circumstances then it would be admissible. The objection is overruled.

MR. BRAND: Thank you, your Honor.

Q (By Mr. Brand, continuing): Sir, do you know what a Laboratory Analysis Sheet is?

A I do.

Q And, when narcotics are found, is there some need to have a laboratory analysis of those narcotics done?

A It is.

Q And, in regards to the case of Reginald Leigh, the hair salon, was there a need for any laboratory analysis?

A It was.

Q And, was there any problem with processing the laboratory analysis during May of 1986, as you recall?

A Yes.

Q What was that, sir, if you recall?

A The Detroit Police Department Laboratory Scientific Lab lost people at the time. We were short of people to process that evidence.

Q Is that one of the factors in this case in making it a not-in-custody case in regard to Mr. Reginald Leigh?

A Yes.

Q Now, were there, in fact, ever any laboratory analysis sheets made in this case versus Reginald Leigh?

A There were.

Q And, would those be contained in your Narcotics Police File?

A Yes.

Q I am showing you a narcotics police file. Is this for Reginald Leigh?

A Yes, it is.

Q Have you had a chance to look at that file prior to your coming to Court today?

A I have.

Q And, do you recall whether or not there were any dates of submission of the narcotics to the Detroit Lab for workup on the narcotics file?

A I do.

Q And what was the approximate date that they were submitted?

A The date that they were conveyed to the lab was one day, the following morning after the arrest of Mr. Leigh.

Q Was that May 9, 1986?

A Yes.

Q And, were those laboratory analysis sheets completed by the Detroit Lab?

A I think it was. The last one was 8-30-86.

Q August 30, 1986?

A Yes.

Q Did you have any scheme, plan or motive to delay the processing of the narcotics in regards to the case of People versus Reginald Leigh?

A No.

Q Did you have any scheme or plan or desire to withhold any property from Reginald Leigh?

A No, sir.

MR. SHERMAN: Objection, immaterial and self-serving.

THE COURT: Objection overruled.

Q (By Mr. Brand, continuing): Do you have any control over forfeiture, actions filed by the Wayne County

Prosecuting Attorney's Office?

A No, sir.

Q Did you ever submit a request for a warrant to the Wayne County Prosecuting Attorney's Office?

A I did, sir.

Q Do you remember the first time you did that, sir?

A The actual date, no, sir.

Q Do you recall what month?

A I believe it was in the very same month of the arrest, sir.

Q Was there a problem with obtaining a warrant at that time?

A Yes, it was.

Q And, do you recall what the problem was?

A One of the problems we had was that the Prosecutor's Office wanted the officers who found the narcotics to have the lock seal folder in which the narcotics was placed on, on their PRC's and not just on the Evidence Officer's PCR's.

Q Do you recall also whether it was a problem with not having the laboratory analysis done?

A That was definitely the first problem.

Q Did you, in fact, after the Laboratory Analysis Sheet was done submit a request to the Prosecuting Attorney's Office for a request for a warrant?

A It was.

Q That was done in December, 1986?

A Yes, it was.

MR. BRAND: Nothing further of this witness.

MR. SHERMAN: I have a few questions, your Honor.

THE COURT: Sure.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Sergeant, you said you submitted this to the Prosecutor's Office immediately after the arrest for warrant, right?

A Pardon me, sir?

Q Immediately after the arrest, you submitted a request to the Prosecutor's Office, wasn't that your testimony?

A No, sir.

Q Oh, when did you first submit this to the Prosecutor's Office?

A Within that month, sir, it was --

Q Was it in the month of May? Have you got your file here?

A Yes.

Q Would that help refresh your recollection?

While you are there, may I see the Lab

Analysis, too, the date of submission and the date of the return.

(Brief pause.)

Q Do you have the first submission?

A This is not the first submission here.

44 Q This is not the first submission. So, you haven't got that, right?

A No, sir.

THE COURT: Is there a date? Do you remember?

THE WITNESS: Your Honor, our Court Officers take them over. If they are not the way they are supposed to be presented then there is usually a note written on the warrant request itself. It was a note with specific instructions as to what to do [illegible] and what date they wanted it.

THE COURT: What date?

THE WITNESS: Your Honor, I don't know, really, the exact date.

Q (By Mr. Sherman, continuing): But, it would be some time in May, right, the month of the arrest?

A Yes.

Q Then you testified, did you not, that the Prosecutor's Office did not issue this warrant at the time because they wanted the Lock Seal Folder numbers on the PCR

that was submitted, is that correct?

A They wanted the Lock Seal -- all of the Lock Seals. They would not go on just the one we had on the Pre-buys. They wanted the Lock Seal Folder numbers which the Evidence Officer had put into evidence on each Officer's PCR who had found narcotics.

Q Now, immediately upon the return to the Police Department's Narcotics Bureau, you take the evidence. You put it in a Lock Seal Folder, right? And there is a tag, is that correct?

A The evidence, Lock Seal Folder has a number printed on it.

Q Okay. And, that is done right away?

A Yes.

Q So, that information was available to you within a matter of a day or two from the time of the arrest in May, is that right?

A The Lock Seal Folder numbers?

Q Right.

A Oh, yes, sir.

Q And yet it took some 225 days from that to have them put on, sent over to the Prosecutor's Office, is that what you are telling this Court?

A No, sir.

Q How quickly did you do it?

A How quickly did I do what?

Q How quickly did you get the Lock Seal Folder numbers on the PCR's?

A Sir, there was no problem in getting the numbers.

Q Right. So, that wasn't a justifiable excuse, was it?

MR. BRAND: Objection, your Honor.

THE COURT: I will let him respond. You can respond, if you can.

A (Continuing): The numbers were --

Q Answer the question.

A -- were one thing that I needed on the PCR's.

THE COURT: Let him answer the question.

A The numbers were not on the individual PCR's as the Prosecutor wanted. They were on -- the numbers were on the tabulization and the list of evidence.

Q All right. Sergeant, how long would it have taken someone to take these numbers that you already had and put them on the PCR's? A week?

A No.

Q A month?

A Maybe five minutes.

Q So, what I am saying is, that wasn't the reason that this was really held up 215 days, is it?

A That's part of the reason.

Q Five minutes. All right, I will deduct five minutes.

Now, let's get to the analysis, okay.

Sergeant, would you tell this Court if there were any analysis done on a narcotics raid from May the 8th that were done prior or by August 30?

A Were there any --

Q Any. Any that stem from an arrest from May 8th on that were done prior to August 30? Were there any done?

A Gees, I don't know. I don't work the lab.

Q I see, okay. But, this analysis certainly was done by August 30th, right?

A The last one, I believe it was August 30.

Q So then the other ones were done prior to August 30?

A Either on that date or I would have to look at the specific dates.

(Proposed Exhibits 1 through 5 were marked.)

Q (By Mr. Sherman, continuing): Sergeant, I will hand you some documents that are marked Exhibits 1 through 5 and ask you if you might identify them?

A They are Laboratory Analyses.

Q The date of submission on each one of those?

A The date of submission is 5-8-86, 5-9-86, 5-9-86, 5-9-86, 5-9-86.

Q All right. And, the date that the analysis was complete and returned?

A The date started, 5-8-86; date completed 5-8-86.

Q Wait. Let's take that one. Let's go. Now, there is an analysis that was given 5-8-86 and completed 5-8-86, is that correct, sir?

A That is correct.

Q What did that analysis show?

A Powder cocaine.

Q I see. So, you had an analysis done, an analysis that showed cocaine on May the 8th, is that correct?

A I believe that is it. I am reading 5-8-86. I think that is it.

Q And, you said it would take five minutes to put those numbers from the Lock Seal Folders on the PCR's?

A Yes.

Q Now, would you tell me, when you had a positive analysis for a violation of VCSA, the information to obtain a warrant, five minutes to put the numbers on the PCR, why it took 225 days to go ahead and get that warrant?

A Well, first of all, sir, this was a Pre-buy, by an SOI and, second of all, the analysis we needed from the confiscations were confiscated were taken to the lab 5-9-86 by Tangiers. The technicians started work

on this 8-29-86 and completed it 8-29-86. Another was started 8-30-86 and was completed 8-30-86; the other 8-29-86 and completed that same day, 8-30-86.

Q All right. Let's go from 8-30. That's August 30, right?

A Yes, sir.

Q When did you obtain the warrant?

A I think it was December -- I don't know the date, it may be the 5th.

Q Okay, let's see, 8-30 to 11-30 to 10-30 to 11-30, that's 90, 90 some days after you received the return of this analysis, right?

A Yes.

Q What was the holdup for the 90 some days in getting the warrant?

A What was the holdup in getting the warrant?

Q Yes. The Prosecutor refused to listen to you?

A No. The Prosecutor did not -- did not issue the warrant the first time it went around.

Q That was back in May?

A Yes.

Q Now, we are talking about in August, August 30?

A It was not issued then.

Q When did you submit it to the Prosecutor for issuance, in December?

A The final time, I think it was in December, yes.

Q So, you let another 90 some days slide by.

Now, sir, you were on this raid?

A Yes.

Q And you know personal property was confiscated from Mr. Leigh, don't you?

A Yes.

Q And, you know that it was turned over to the Forfeiture Section, right?

A Yes, paperwork was turned over. I don't know if the items themselves.

Q The paperwork was turned over for them to proceed?

A Yes.

Q And, did you ever hear or have any contact with the Forfeiture Section after that paperwork was submitted?

A No, other than on other occasions to submit more paperwork.

Q They made no inquiry as to this matter at all from you or any of your crew or your boss?

A To me personally?

Q Or you don't know -- do you know of anyone else?

A They could have. To me personally, no.

Q Are you familiar, sir, with the fact that -- the claim for the return of property was filed with the Forfeiture Act Unit and a Lonl cut up by Mr. Leigh

for the return of his property in the latter part of September?

A No, sir, I don't work the Forfeiture Section. I work the Narcotics Section. I have nothing to do with what they do.

Q Would it not be standard procedure of the Forfeiture Section to contact the Narcotics Section to ascertain why this property was being held and what's happening in the case of a warrant was going to be issued or something?

A No, sir.

Q No. Okay. Well, suffice it to say then, Sergeant, that at least 90 plus days elapsed from the time that you had your analysis returned to you and the Lock Seal Folder numbers and everything before you submitted this for a warrant, is that correct?

A Yes, sir.

MR. SHERMAN: Okay. Nothing further.

MR. BRAND: No other witnesses. No other questions, your Honor.

THE COURT: Let me ask you, Sergeant Fowler, you were one of the persons that participated in the initial raid, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Okay. And, narcotics were

found on the premises?

THE WITNESS: It was.

THE COURT: Whereabouts specifically?

THE WITNESS: Some was found on a person. The other was found in a back office. The barber shop or salon is shaped rectangular with the offices in the back of them, the rear of the salon. The chairs would be or the place open to the customers that I know of would be from the front door and stopped maybe about eight feet from the rear office.

To get to the rear office you would have to come behind the partition and go in an easterly direction to get to the office.

THE COURT: They are on the desk top or where were they?

THE WITNESS: There was a jacket that was hanging up in the office area that some of the narcotics was taken out of. And, I believe some was taken out of, either -- I am not sure about this, your Honor. Either it was a narcotics or paraphernalia taken from a blue suitcase, I believe it was, that was also in the office.

THE COURT: Now, Mr. Sherman indicated earlier that the jacket is now missing, is that --

THE WITNESS: Your Honor, I do not

believe the jacket itself was taken.

THE COURT: I see.

THE WITNESS: Proof of ownership from the jacket was taken.

THE COURT: What type of business was this?

THE WITNESS: It is a hair salon.

THE COURT: A barber shop?

THE WITNESS: A barber shop, hair salon.

THE COURT: Now, you mentioned, I think, when Mr. Brand asked you questions, you mentioned something about an Out-of-Custody Warrant?

THE WITNESS: Yes, your Honor.

THE COURT: What did you do? Did you serve him with a piece of paper charging him with something specifically at that time?

THE WITNESS: Your Honor, once, because we worked the street end of it, once we bring a person in on arrest, if we don't type up the warrant right then, and we can only do that if we test the substance that we confiscate to find out if it is a narcotic, the Detroit Police Department Narcotics Section does not have the capabilities to test cocaine.

THE COURT: Yes.

THE WITNESS: So, that has to be sent to the scientific lab. They are processed and how they do things and the time it takes them to do things, we really have no control over.

On a Not-in-Custody Warrant, if we get what we believe to be cocaine, then what we will do is send it to the lab and release the person to appear, what we call a DPA.

THE COURT: Okay. But, did you give this defendant some piece of paper saying, "This is what the charge is,"?

THE WITNESS: No, your Honor, personally, I did not. Because, when we -- when I left this scene, the people who are the administrators or the people who are handling prisoner processing and they also run the warrants in the morning, they handle that.

THE COURT: Okay. Thank you. Are there any other questions?

MR. SHERMAN: Yes, your Honor. I have a couple of questions.

CROSS-EXAMINATION CONTINUED

BY MR. SHERMAN:

Q Sergeant, are there not some field tests that you performed to show positive presence of cocaine?

A Is there a field test that you can do?

Q Yes.

A Yes, there is but it is not recognized by the Detroit Police Department. They cannot disallow that.

Q All right.

A We don't have -- I don't have the expertise in using that field test, so I don't use it.

Q You do run a field test?

A "I do?" No.

Q I mean somebody from the crew. I am not talking about you particularly. Don't you, if you confiscate something, don't you want to have some idea whether it is positive or negative?

A That's the reason why we send it to the lab, sir.

Q And you don't run any field test?

A No, sir. No one on that crew is trained to do so, so we can't do it.

Q Now, Sergeant, can you tell me why the normal process, if you are not going to run an analysis, to release the man, right?

A If you are not --

Q If you are not going to submit it for analysis, you are going to release the man because you can't get a warrant at that time, is what you are telling me?

A That's correct.

Q Notwithstanding you had a positive analysis on the 9th from the first submission, okay.

Now, can you tell me why this man was held for two and a half days prior to his release?

A He was in the hospital.

Q He was in custody, was he not?

A Yes, but he was in the hospital.

Q Well, but he was a police prisoner in the hospital?

A Yes.

Q Okay. So, he was in custody?

A Yes, of his choosing. He wanted to go to the hospital.

Q Now, you are aware that Mr. Leigh and myself called numerous times to the Narcotics Squad about -- to find out whether or not a warrant was going to be issued?

A No, sir. I don't even work in that office.

MR. SHERMAN: I have nothing further from this witness.

THE COURT: Thank you. Mr. Brand, do you have anything in your file, a piece of paper that is a duplicate of something that was served upon the defendant back in May, charging him with the offense?

MR. BRAND: No, your Honor.

THE COURT: If you have arguments, you may make them at this time.

MR. SHERMAN: Your Honor, the law is clear in the situation. Certainly the Prosecution through Sergeant Fowler has not sustained in any way, shape or form the burden of showing the reason for the delay. Because, notwithstanding everything, one, the analysis was completed, even giving that to the Prosecution on 8-30 which is August 30.

The request for a warrant didn't come in until the 5th of December, an additional 90 some days elapsing. The Hernandez case says 42 days is prejudicial. But, why it would take all that time when he admittedly has a positive return, allegedly on the 9th day of May and there is no satisfactory explanation other than they had some problem with the chemist in May.

What happened with June? What happened with July? What happened with the first 30 days in the month of August? Your Honor, the delay is unexplainable and even after they had everything, they waited another 90 some days.

Now, in that period of time, one, your memory is vague, people move, people change addresses. This is like two-thirds of the year. Then you come with a warrant and you don't have the jacket and I don't know where the jacket is, whether it was taken

by them or not. But, the Officer who testified at the exam said they don't have the jacket. And, now you are going to say, "These narcotics that was found in the jacket, in an area where other people were found also belongs to the defendant." With no jacket to try it on, no witnesses to testify who it may have belonged to. This puts the defendant in a position which is totally untenorable and unjust. He could not conceivably now get ahold of the people that could testify because of this delay. And, the delay, your Honor, is unwarranted, unjustified. There is no reason for it, other than to the net result whether it was intentional or not as to prejudice the defendant. The delay doesn't have to be intentional. It is the net result that it is an unexplanable delay and that innures to his prejudice and certainly it is obvious that it so innures.

THE COURT: Let's hear from the Prosecutor.

MR. BRAND: First of all, your Honor, I would like to cite the case of People versus Anderson at 88 Mich Appeals, 513 which stands for the premise that there is no Constitutional Right to be arrested. And, in this situation, that is really the focus of this question.

If we have a not-in-custody person who has been arrested, been held, requested to go to the hospital; he has been released after two, two and a half days. He knows why he has been arrested and normal procedure would be to tell him that the Police Department will be seeking a warrant and that the matter is still pending.

There is, I think, a good-faith effort by the Police Officer who testified today, Sergeant Fowler, that they could not get the laboratory analysis done in time to seek an in-custody warrant. That's why he was released.

The Pre-buy is the one analysis sheet that was done on May 8th, I believe it was finished. The Pre-buy is the probable cause for the Officers to go to a Magistrate to say, "We have cocaine in our Pre-buy, please give us a search warrant", and executed on the fact that the Police Officers swear to in the search warrant.

But, that was the Pre-buy, your Honor. It had nothing to do with the actual narcotics that were taken in the search warrant execution raid.

Furthermore, your Honor, defendant's Counsel cites delay and arrest cases. Well, those are situations where the defendant had no knowledge.

In Hernandez, it is an unsophisticated, uneducated person who had no knowledge that the police were even going to arrest him, and that's where the prejudice might have innured and did innure to hernandez.

But, this is a different situation because the defendant has been arrested, processed and he knows what he is there for. Furthermore, your honor, People vs. Oliver at 90 Mich Appeals 144 shows that the burden on this prejudice from the delay must be shown by the Defense Counsel and in People vs. Williams at 114 Mich Appeals 186, it must be more than a mere claim of prejudice by Defense.

THE COURT: Let me take a look at that case right quick, 114 Mich Appeals. You may continue and I will have someone get that.

MR. BRAND: -- 186. In essence, there is a need for testimony from someone to show us delay. All we have had here is argument from Defense Counsel. There is delay, there is prejudice.

Furthermore, Williams, the case which the Court has requested to see showed an allowable delay and the arrest of two years.

I would like to ask the Court to consider that, although these delay and arrest cases

are really all that there are on the law, that it is really -- it is an analogous argument because those cases are focusing on the defendant never being arrested, never having knowledge that he's under suspicion for a certain act.

In this case the defendant was arrested. It was a Not-in-Custody Warrant situation. The defendant had knowledge of the fact that he would be called back in, possibly for further processing.

Now, also I would like to argue to the Court that the Sergeant has explained the reasons of the delay to August 30. He is a street person who does executions of warrants and works out on the streets and that he doesn't have any deliberate intent to bring a warrant against this person Reginald Leigh because of any forfeiture act pending. He said he had no intent to even no knowledge of that situation. That's one of the factors in a Hernandez analysis.

And, I would argue to the Court that the case of United States Supreme Court versus -- U.S. vs. Marion, Page 404 U.S. 307 cites that the due process clause affords a limited protection to those who have not been arrested.

And, in that situation, it is not a full blown protection from that arrest. Of course,

I cited the earlier case, the Michigan case and there is also the Supreme -- United States Supreme Court case that the defendant has no Constitutional Right to be arrested.

But, I think the main focus here is that this was a Not-in-Custody Warrant. That there has been no substative evidence or even any testimony that there has been any prejudice. And, in fact, the defendant was free. He was out on the streets. He knew he had been arrested and he knew what for. He had the opportunity at that time to gather up any names of any persons that were in his show or any witnesses that he wanted to talk to. He had an opportunity to do all that and he didn't do it. He chose not to do it. Or, according to Defense Counsel, they were having problems preparing their case which is just an allegation. There is no evidence on that.

Based on that, I ask the Court to deny the motion under the due process clause which the Defense Counsel brings.

THE COURT: Now, it is my understanding that there are two motions that have been presented by Mr. Sherman. The first motion he argued it and that motion complains that because of a delay of 225 days from the time of the alleged criminal activity

and the arrest that his client has been unduly prejudiced and his Constitutional Rights therefore have been violated and for that reason this case should be dismissed.

This case, to me, is somewhat similar to the case of People vs. Hernandez in which there was a delay of some 42 days. There was a situation where there had been a dope -- alleged dope transaction, drug transaction, purchase made and later a search warrant executed upon a home. And there was 42 days from that alleged incident that the defendant in the case was subsequently arrested and charged with the drug offense. And, the Court reviewing that situation and as pointed out by Defense Counsel, one of the considerations in that case was the fact that this person, the defendant was illiterate and it appeared certainly in that case, that he had very little understanding what was occurring. But, the Court went on in the Hernandez case to set out the guidelines which are used in judging whether or not person's rights have been violated. One of the things that they looked at is whether or not the delay is explainable. And in our case, the case that we have before us today, I believe Sergeant Fowler has explained the delay. Whether or not that prejudiced

the defendant is another matter, but he has given an explanation.

He has indicated at that time the lab had a personnel shortage and, I think it is pretty common knowledge that there was a shortage of chemists in that department which backed up the analysis that they were performing. The other thing that we look at is whether or not the delay is deliberate.

Now, Mr. Sherman suggests in his argument that because of a motion filed to return property and the like that there might have been something under the table that made this deliberate. I don't see it that way. The important issue though, is whether or not the delay of some 225 days caused this defendant undue, and I believe that Mr. Sherman has made a pretty good case, in my opinion, in support of that.

First of all, we are dealing here with a business establishment. Officer Fowler has indicated that it was a beauty-type barber shop type business and one would expect large number of people coming and going from that type of establishment. He indicated that the drugs were found in one of the back room. Some were found in a jacket. He, for purposes of this hearing, was not able to clearly

identify where the other drugs were found.

The jacket, according to Sergeant Fowler, was not confiscated. He indicated that they did have proof of residency and, apparently, they are relying on that. But, the Court case, the case of Hernandez and the other cases which are in this area, look to whether or not the delay -- and there is no particular number of days involved -- but whether or not sufficient time has expired that would cause the Defense. And the Defense have said they have trouble finding out who was there, and that is understandable.

It is a business place. They have trouble finding out who was there at that time who could give testimony in their behalf. They also indicated that they have a problem remembering the details of the situation with the expiration of the time that was involved here.

Now, I believe that looking at this matter on balance that this defendant would have a tough time defending himself against these charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time. And, there is, in my opinion, undue prejudice because of the delay. And, at this time, although the

intentions of the police seem to be within reason, they are just working with a very difficult situation or were working with a very difficult situation at that time. But it appears that this defendant would be unduly prejudiced to permit this to continue and for that reason the complaint is dismissed and the defendant is discharged from this complaint.

MR. SHERMAN: Thank you, your Honor. I will present an order.

THE COURT: Very well.

(Matter concluded.)

- - -

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

I, Vera D. Beauford, Court Reporter of the Recorder's Court for the City of Detroit, State of Michigan, do hereby certify that the foregoing pages 1 through 36, inclusive, comprise a full, true and correct transcript of the proceedings and testimony taken in the matter of The People of the State of Michigan vs. Reginald David Leigh, Recorder's Court No. 87-00032 before the Honorable Prentis Edwards.

VERA D. BEAUFORD
CERTIFIED OFFICIAL COURT REPORTER
CSR-0080

MECHANICALLY REPRODUCED COPIES OF THIS TRANSCRIPT ARE NOT CERTIFIED UNLESS THE CERTIFICATE PAGE BEARS AN ORIGINAL SIGNATURE.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

REGINALD D. LEIGH,

Defendant-Appellee.

JUN 09 1988

No. 99662

BEFORE: D.E. Holbrook, Jr., P.J., and MacKenzie and N.A. Baguley*, JJ.

PER CURIAM

Defendant was charged with possession with intent to deliver less than 50 grams of cocaine, MCL 333.7104(1)(2)(a)(iv); MSA 14.15(7104)(1)(2)(a)(iv). The prosecutor appeals as of right from a Recorder's Court order dismissing the charge. We affirm.

The dismissal stems from defendant's claim that he was denied due process because 225 days elapsed between his arrest and the initiation of prosecution against him. The record establishes that the police executed a search warrant at defendant's business, Reggie's Styles Unlimited hair salon, on May 8, 1986. Several people were in the salon at the time. During the search, Officer James Willis retrieved from a yellow sport jacket he found hanging in a back room a bundle of 20 coin envelopes containing cocaine and paperwork with defendant's name. Defendant was arrested and later released from police custody when no complaint and "in-custody" warrant were issued. A complaint and "not-in-custody" warrant were eventually issued on December 2, 1986.* Defendant was arraigned on December 18, 1986, 225 days after his original arrest.

In People v Bisard, 114 Mich App 784, 791; 319 NW2d 670 (1982), this Court stated the test to be used in determining whether a delay in instituting prosecution denies a defendant due process:

---

*Circuit judge, sitting on the Court of Appeals by assignment.

"[O]nce a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. This approach places the burden of coming forward with evidence of prejudice on the defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibility for determining when an investigation should end."

See also People v Vargo, 139 Mich App 573; 362 NW2d 840 (1984); People v Shelson, 150 Mich App 718; 389 NW2d 159 (1986), lv den 426 Mich 862 (1986); People v Dungey, 147 Mich App 83; 383 NW2d 128 (1985).

Defendant's contention was that the yellow jacket containing the cocaine was not his and was too small to fit him. By December, the jacket was missing. At the hearing on defendant's motion to dismiss, defense counsel claimed that the delay prejudiced defendant's efforts to determine the owner of the yellow jacket. Counsel pointed out that there were several employees and customers in the salon at the time the warrant was executed, and that the back room was routinely used as a lounge by customers and apparently employees so that the jacket could belong to anyone. By December, defendant had forgotten the names of everyone present on May 8 and had been unable to locate some of those persons whose presence he did recall and who might know to whom the jacket belonged.

Police officer Franscott Fowler, who was involved in the execution of the search warrant on May 8, testified that the primary reason for the delay was that a laboratory analysis of the cocaine was needed before a warrant could be issued, and that due to a shortage of technicians that analysis was not completed until August 30, 1986. Fowler offered no explanation for the 94-day delay between completion of the analysis and issuance of the complaint and warrant. Fowler further testified that the police originally sought a complaint and warrant from the prosecutor's office in May, but that the prosecutor "wanted the officers who found the narcotics to have [identification numbers of the] lock

seal folder[s] in which the narcotics [were] placed on . . . their PCR's and not just on the Evidence Officer's PCR's". On cross-examination, Fowler estimated transferring the numbers would take approximately five minutes.

The trial court ruled as follows:

> "Now, I believe that looking at this matter on balance that this defendant would have a tough time defending himself against these charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time. And, there is, in my opinion, undue prejudice because of the delay. And, at this time, although the intentions of the police seem to be within reason, they are just working with a very difficult situation or were working with a very difficult situation at that time. But it appears that this defendant would be unduly prejudiced to permit this to continue and for that reason the complaint is dismissed and the defendant is discharged from this complaint".

The prosecution contends that the trial court clearly erred in finding that defendant had shown prejudice because of the delay, the first part of the Bisard test. More specifically, the prosecution suggests that "the Bisard court's statement that defendant carries the burden of showing 'some' prejudice was an inadvertent error." According to the prosecution, defendant had to show actual and substantial prejudice and purposeful delay to gain tactical advantage in order to meet his burden of going forward. We disagree with the prosecution's analysis. We think that the Bisard panel's adoption of the "some prejudice" standard was deliberate rather than "inadvertent error". The crux of the Bisard test is the balancing of prejudice to defendant against the reasonableness of the delayed prosecution. Under the prosecution's proposed test, there would be no need to balance; either the scale would inevitably tip toward the defendant or the court would not reach the balancing stage because the defendant could not meet the stringent burden the prosecution would have imposed.

In this case, the court found that the defendant had adequately shown prejudice and we are not convinced that this determination was erroneous. Nor can we say that the court erred in finding the reason for the delay -- understaffing in the

laboratory -- was sufficient to justify the delay. Compare Dungey, supra. In any event, this explanation completely failed to account for 94 days of the delay. Accordingly, we affirm the ruling of the trial court that on balance, the prejudice to defendant outweighed the reasons provided by the state for the delay.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ Norman A. Baguley

Order

Entered:
September 13, 1988

Dorothy Comstock Riley
Chief Justice
Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

88-557

83641

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

REGINALD D. LEIGH,

Defendant-Appellee.

SC: 83641
COA: 99662
LC: 87-00032

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Brickley and Boyle, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

September 13, 1988

Corbin R. Davis

Clerk